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Nunavunmi Maligaliuqtiit
NUNAVUT COURT OF JUSTICE
Cour de justice du Nunavut

Citation:	***Government of Nunavut (Attorney General and Minister of Environment) v. Arctic Kingdom Inc.,* 2019 NUCJ 10**
Date:	20190620
Docket:	02-17-12660; 02-17-12661; 02-17-12662; 02-17-12663
Registry:	Iqaluit
Applicant (Accused):	**Arctic Kingdom Inc.**
	-and-
Respondent (Crown):	**Attorney General of Nunavut as represented by the Attorney General of Nunavut and the Minister of Environment**

Before:	Mr. Justice Paul Rouleau
Counsel (Applicant):	A. Crawford & L. Idlout, articled student
Counsel (Respondent):	E. Stockley
Location Heard:	Iqaluit, Nunavut
Date Heard:	April 25, 2019
Matters:	Constitutional challenge to *Wildlife Act* section 117(2) and its adjoining *Licences and Tags Regulation*.

REASONS FOR DECISION

(NOTE: This document may have been edited for publication)

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I. OVERVIEW

[1] The applicant, an outdoor tour operator, was charged under s. 117(2) of the Nunavut *Wildlife Act*, SNu 2003, c 26 [*Wildlife Act*]. Subsection 117(2) requires that all persons establishing, offering or providing activities in which wildlife is the object of interaction, manipulation or close observation obtain a licence.

[2] The applicant challenges the validity of s. 117(2) and s. 37 of the *Licences and Tags Regulations*, Nu Reg 012-2015, pursuant to which the licences are issued. It maintains that they infringe s. 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. The applicant contends that s. 117(2), along with its implementing regulations, are void for vagueness and overbroad. It also submits that the impugned provisions exceed the authority of the Nunavut Legislative Assembly.

[3] In my view, the enactments do not exceed the Legislative Assembly's authority. Furthermore, the applicant has failed to establish the impugned provisions are impermissibly vague or overbroad.

[4] Accordingly, I have concluded that the application must be dismissed.

II. BACKGROUND

[5] The applicant, Arctic Kingdom Inc., is an outfitter providing adventure tourism activities in Nunavut. On May 8, 2017, the respondent Government of Nunavut (GN) issued four Summary Offence Ticket Informations to the applicant for failing to hold a Wildlife Observation Licence. Pursuant to s. 117(2) of the *Wildlife Act*, the GN requires that all persons establishing, offering or providing activities in which wildlife is the object of interaction, manipulation or close observation obtain a Wildlife Observation Licence. The GN alleges that the applicant organized such activities without the requisite licence in late March 2017.

[6] The applicant pleaded not guilty and a trial was set for June 18, 2018.

[7] On June 1, 2018 the applicant filed a notice of intention challenging the validity of s. 117(2), the provision pursuant to which the charge

was laid. The trial was adjourned pending the disposition of the application.

[8] A case management conference was held on November 30, 2018. The applicant was directed to file the application materials in accordance with this court's practice directives. Although the applicant initially described the application as being a non-*Charter* constitutional challenge to s. 117(2) and of the Regulation, over time the nature of the challenge evolved into the grounds now being advanced.

[9] One ground is that s. 117(2) exceeds the authority of the Nunavut Legislative Assembly. Subject to certain exceptions, s. 24 of the *Nunavut Act*, SC 1993, c 28, prohibits the legislature from making laws "that restrict or prohibit Indians or Inuit from hunting, on unoccupied Crown lands, for food game". If enforced, s. 117(2) would impose licensing obligations on Indians and Inuit in contravention of the *Nunavut Act*.

[10] The second ground advanced is that s. 117(2) is void for generality, uncertainty or vagueness. If comprehensively enforced, the provision would require that anyone who engages in close observation and manipulation of wildlife obtain a licence. The persons and activities subject to this restriction are unclear, making the provision overly vague. Additionally, the applicant argues that s. 117(2) is overbroad. As a result, it seeks to have the impugned provisions declared void and invalid pursuant to s. 24(1) of the *Charter*.

III. IMPUGNED PROVISIONS

[11] Subsection 117(2) of the *Wildlife Act* reads as follows:

> No person shall, without a licence authorizing it, establish, offer or provide any organized activity in which wildlife is the object of interaction, manipulation or close observation, including the making of a film or the provision of an expedition, safari or cruise.

[12] "Wildlife" is defined in s. 2 of the Act as "the flora and fauna to which this Act applies under subsections 6(2) and (3), including all parts and products from wildlife."

[13] Subsections 6(2) and (3), in turn, read as follows:

> (2) This Act applies in respect of
>
> (a) all terrestrial, aquatic, avian and amphibian flora and fauna that are wild by nature or wild by disposition;
> (b) all parts and products from wildlife; and
> (c) all habitat of wildlife.
>
> (3) This Act does not apply to
>
> (a) a species that is a fish, as defined in section 2 of the *Fisheries Act* (Canada);
> (b) a marine plant, as defined in section 47 of the *Fisheries Act* (Canada); or
> (c) a bacterium or virus.

[14] In addition, s. 37 of the *Licences and Tags Regulations* reads:

> (1) A wildlife observation licence is required under subsection 117(2) of the Act for a person to establish, offer or provide any organized activity in which wildlife is the object of interaction, manipulation or close observation, including the making of a film or the provision of an expedition, safari or cruise.
>
> (2) A wildlife observation licence authorizes the holder to establish, offer or provide the specific activity authorized by the licence.
>
> (3) For greater certainty, the incidental observation of wildlife during the course of travelling by foot or by vehicle or other conveyance does not require a wildlife observation licence.

[15] The language of the impugned regulations largely mirrors the text of s. 117(2). The material differences are that it specifies that "the incidental observation of wildlife during the course of travelling by foot or by vehicle or other conveyance does not require a Wildlife Observation Licence" and its placement within the commercial licences section of the Regulation, suggesting that only commercial enterprises are required to obtain a licence. Given that the scope of the Regulation is, if anything, narrower than that of s. 117(2), if the challenge to s. 117(2) fails, the challenge to the Regulation will inevitably also fail. As a result, I will focus my analysis on s. 117(2).

IV. FACTS

[16] The applicant called five witnesses who provided context to the applicant's challenge. The witnesses were tendered as having expertise in the following areas:[1]

Witness	**Expertise**
Evie Onalik	1) Food gathering (berry picking) in Nunavut 2) Community life in Nunavut as it relates to hunting and food sharing 3) Country food consumption
Adamee Itorcheak	1) Social media in Nunavut 2) Community life in Nunavut as it relates to hunting and food sharing
Glenn Williams	1) Hunting in Nunavut 2) Community life in Nunavut as it relates to hunting and food sharing 3) Law enforcement (wildlife) in Nunavut including the wildlife provisions of the *Nunavut Land Claims Agreement*
Kowmagiak Mitsima	1) Hunting in Nunavut 2) Community life in Nunavut as it relates to hunting and food sharing
Alethea Arnaquq-Baril	1) Filmmaking in Nunavut and in Canada 2) Film policy and regulation of filmmaking in Nunavut 3) Intersection of food, politics and film in Nunavut

The witnesses were all accomplished residents of Nunavut, each having made significant contributions in their areas of endeavour. Their testimony centred on the cultural and social significance of interacting with wildlife in Nunavut. The reports they filed on the application consisted of a series of answers to questions posed of them. The answers they gave in their reports as well as the testimony given at the hearing were guided by a series of "definitions" that were provided to them. The two-page document setting out those definitions is attached as an appendix to this decision [Appendix A].

[1] The applicant referred to its witnesses as experts. I admit their evidence as it provides social and legislative facts rather than expert opinions. As I explain immediately below, the witnesses' opinions are based on a flawed description of the impugned provisions' scope. In my view, it is for the court to interpret the provision and the proffered opinions do not meet the *Mohan* test for necessity and reliability.

Suffice it to say that the definitions that were provided to the witnesses gave an extremely broad interpretation to the various terms used in s. 117(2). By way of example, those definitions interpret the word “offer” as it is used in s. 117(2) as including “inviting, asking to join, making a suggestion, allowing someone to follow…”. It also suggests that “organized activity” does not have to be commercial, and it can be a family activity or an activity with friends.

[17] As a result of the broad definitions being provided to the witnesses and the witnesses having accepted these interpretations, the witnesses all testified that s. 117(2) would have a very broad impact on the Inuit community and Inuit way of life. By way of example, Evie Onalik saw it as interfering with family life as it would require that families obtain a licence in order to go out berry-picking as a group. Glenn Williams was concerned that observing caribou while on a fishing trip with his grandson would require a licence. He explained that he would be observing caribou not to hunt it but rather to assess the caribou’s health and numbers as well as to teach his grandson to distinguish between male and female caribou in the event that his grandson would later choose to hunt caribou.

[18] Adamee Itorcheak expressed concern that if an Inuk chose to post a picture of his first catch (a significant event in Inuit custom) on Facebook, this would constitute offering or providing a film which is an activity required to be licensed pursuant to s. 117(2). In effect, it was suggested that vast amounts of social media interaction would be shut down or all those who share pictures and information on social media without first obtaining a licence would be made into criminals. Mr. Itorcheak identified the applicant as an outfitter and went on to express concern that some outfitters, without reference to the applicant, were questionable operators. The suggestion being that regulation or licensing may not be inappropriate provided it was of the right entities and in the right circumstances.

[19] Kowmagiak Mitsima expressed the concern that s. 117(2) would take away the right of Inuit who are simply trying to put food on the table and provide for their families.

[20] Alethea Arnaquq-Baril was concerned that implementation of the licensing requirement for filmmaking is virtually impossible. The licensing requirement, in her interpretation of s. 117(2) may well apply to any picture taken of wildlife that is shared on social media. She was, however, supportive of the idea that reasonable rules should

exist to protect wildlife from otherwise disrespectful behaviour of film crews. She was of the view that it is a good idea to put protections in place and explained that indigenous filmmakers have been working on an indigenous protocol for films.

[21] In its submissions, therefore, the applicant argued that, if enforced, s. 117(2) would have the broad impact feared by these witnesses. It raised a number of additional hypothetical problems. For example, those animals that are killed in a hunt are often shared at community feasts. The sharing of the meat would, in the applicant's view, constitute an "organized manipulation" of the wildlife requiring a licence. Further, most hunting carried out by Inuit is the result of an organized activity thereby requiring another licence. The subsequent posting on social media of the kill after the hunt would require another licence as it constitutes the making of a "film" involving "handling" of wildlife. The applicant argued that even selling beauty products made in part from animal products would be subject to the provision as it is an organized activity involving manipulation of wildlife parts, wildlife parts being included within the definition of wildlife.

[22] As I will explain, given the interpretation I have given to s. 117(2) and s. 37 of the Regulation, the concerns expressed by the witnesses are largely misplaced. I turn now to the legal issues.

V. ISSUES

[23] This application raises two main issues:

1. Does s. 117(2) of the *Wildlife Act* exceed the authority of the Nunavut Legislative Assembly?
2. Does s. 117(2) of the *Wildlife Act* infringe s. 7 of the *Charter*?
    (i). Does s. 117(2) cause a deprivation of life, liberty or security of the person?
    (ii). Is s. 117(2) overbroad such that it offends the principles of fundamental justice?

(iii). Is s. 117(2) vague such that it offends the principles of fundamental justice?

VI. ANALYSIS

A. (1) Does s. 117(2) of the *Wildlife Act* exceed the authority of the Nunavut Legislative Assembly?

[24] The classes of subjects in relation to which the Nunavut legislature may make laws are outlined in s. 23 of the *Nunavut Act*. Section 24, however, curtails the legislative assembly's power to enact restrictions on hunting. It reads:

> The Legislature may not make laws under section 23 that restrict or prohibit Indians or Inuit from hunting, on unoccupied Crown lands, for food game other than game declared by order of the Governor in Council to be game in danger of becoming extinct.

[25] The applicant submits that, by enacting the licensing requirement in s. 117(2) of the *Wildlife Act*, the legislature exceeded its legislative authority. Hunting, the applicant argues, requires "organized activity" and involves "interaction," "manipulation" and "close observation" with wildlife as the object, which s. 117(2) requires be licensed. The applicant contends that s. 117(2)'s prohibition on such organized activity by an Inuit person unless a licence has been obtained contravenes s. 24 of the *Nunavut Act* and is therefore *ultra vires*.

[26] I acknowledge that, read in isolation the words "No person shall" and the broad activities listed in s. 117(2) could be interpreted as imposing licensing requirements on all persons, involved in any number of daily or regular activities.

[27] However, interpreting a statute requires the reader to look beyond the enactment's words. Summarizing the preferred approach to statutory interpretation, Iacobucci J wrote that "statutory interpretation cannot be founded on the wording of the legislation alone": *Rizzo & Rizzo Shoes Ltd*., (Re), [1998] 1 SCR 27, at para 21, 154 DLR (4th) 193. Iacobucci J went on to quote Elmer Driedger for the proposition that "Today there is only one principle or approach, namely, the words of

an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *ibid*.

[28] As I will explain, a contextual reading of s. 117(2) reveals that the provision applies in much narrower situations and, in particular, does not restrict hunting by Inuit and is therefore *intra vires*.

[29] In coming to this conclusion, I am guided by an important presumption, that of legislative intent. Courts are to presume that a legislature does not intend to violate jurisdictional limits. In *McKay v R*, [1965] SCR 798, 53 DLR (2d) 532, the Supreme Court held that "if words in a statute are fairly susceptible of two constructions of which one will result in the statute being *intra vires* and the other will have the contrary result the former is to be adopted": at 804.

[30] In light of this principle, I begin my analysis with the presumption that s. 117(2) is *intra vires* while recognizing that the presumption can, of course, be displaced.

[31] Turning first to the text of s. 117(2) itself, the GN points to the activities listed in the provision and argues that it suggests a narrowing of the s. 117(2) licensing requirement. It will be recalled that the impugned provision creates a licensing requirement for organized activities "including the making of a film or the provision of an expedition, safari or cruise." In light of this list, the GN contends that the types of activities requiring a licence are commercial in nature. It relies on the maxim of *ejusdem generis*, meaning "of the same class" or "of the same genus." Under this maxim, a general word that accompanies a list of specific items can be read down to include only items coming within the same general class.

[32] Applying the maxim of *ejusdem generis* to s. 117(2) poses two problems. First, the Supreme Court has found that the rationale for applying the maxim of *ejusdem generis* is absent when the general word precedes rather than follows an enumeration: *National Bank of Greece (Canada) v Katsikonouris*, [1990] 2 SCR 1029, 74 DLR (4th) 197. Here, the general words "organized activities" precede the list of included activities. Second, the word "including" may act as a word of extension rather than narrowing the class: *ibid*. Explained differently, "including" may be used to clarify that the class extends to potentially doubtful examples: Ruth Sullivan, *Statutory Interpretation*, 2nd ed.

(Toronto: Irwin Law, 2007), at 182.

[33] That is not to say it would be unreasonable to rely on the enumerated items in s. 117(2) to narrow its application. Listing – either before or after – can be used to attenuate the meaning of generic terms. While the maxim of *ejusdem generis* may not technically apply, the principle of contextual interpretation still holds: Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3rd ed. (Toronto: Thomson Canada, 2000), at 317. Moreover, there is some support in appellate jurisprudence for using the word "including" to limit a class if that word clarifies the provision: *Aquasource Ltd. v British Columbia (Information & Privacy Commissioner)* (1998), 58 BCLR (3d) 61 (CA) at para 39, 111 BCAC 95. The filmmaking and the provision of an expedition, safari or cruise list suggests that the section is focused on activities that are commercial in nature.

[34] I turn now to the *Wildlife Act* as a whole. Specifically, the impugned provision's location within the legislation and the Act's internal coherence are instructive.

[35] Section 117(2) is situated in Part 4 of the *Wildlife Act*, which is titled "Commercial and Other Activities." This contextual indicator lends credence to the GN's contention that s. 117(2) applies to organized activities of a commercial nature rather than to hunting and berry picking by Inuit.

[36] It is significant that the *Wildlife Act* contains a separate section – Part 2 – in which Inuit rights and other treaty rights are addressed. Within that part, s. 10 provides:

> (1) Pursuant to the Agreement, an Inuk with the proper identification may harvest wildlife without any form of licence or the imposition of any form of tax or fee if, in the case where a total allowable harvest for a stock or population of wildlife is established, the harvesting does not exceed his or her adjusted basic needs level. [Emphasis added].
>
> (2) An Inuk with the proper identification may harvest wildlife without any form of licence or the imposition of any form of tax or fee if, in the case where a total allowable harvest for a stock or population of wildlife is not established, the harvesting does not exceed the full level of the Inuk's economic, social and cultural needs. [Emphasis added].

> (3) The right of an Inuk to harvest under this section applies throughout Nunavut.
>
> (4) Pursuant to the Agreement, non-quota limitations established on Inuit shall not unduly or unreasonably constrain their harvesting activities.

[37] "Harvest," as that term is used in s. 10 and throughout the Act, "means the reduction of wildlife into possession, and includes hunting, trapping, netting, egging, picking, collecting, gathering, spearing, killing, capturing or taking by any means": s. 2, *Wildlife Act*. [Emphasis added]. Only the inclusion of hunting in this definition is relevant for the purpose of ascertaining whether s. 117(2) is *ultra vires*. However, I pause to note that picking is also encompassed in the term harvesting as the exclusion of berry picking from licensing requirements will become relevant later, in determining whether s. 117(2)'s effects exceed its purpose. The *Wildlife Act* contains similar provisions to s. 10 in relation to Northern Quebec Inuit and Aboriginal people of the NWT: ss. 12-13.

[38] The applicant submits that s. 10 has a very narrow application. According to its reading of that section the only wildlife the section allows an Inuk to harvest without a licence is wildlife for which a total allowable harvest has been established. It explains that the punctuation in the text of the section suggests that the exemption from the requirement to obtain a licence applies only where an allowable harvest has been established. As a result, a licence would be required for "food game" for which no total allowable harvest has been established. This, in its submission, contravenes the Nunavut Act and the *Nunavut Land Claims Agreement*.[2]

[39] I disagree. The applicant's submission focuses on s. 10(1) and overlooks s. 10(2). It is true that s. 10(1) concerns licensing exemptions where a total allowable harvest has been established. However, s. 10(2) outlines a further licensing exemption for cases where a total allowable harvest has *not* been established, both provisions being subject to a needs-based limit on harvesting. In any event, the reading suggested by the applicant would lead to the incongruous result of requiring Inuit to obtain a licence before harvesting wildlife that does not have a total allowable harvest limit such as ptarmigan and blueberries but exempt them from licensing for

[2] Ratified by Parliament by the enactment of the *Nunavut Land Claims Agreement Act*, SC 1993, c 29.

wildlife subject to limits. Such a reading would also not accord with articles 5.6.1 or 5.7.26 of the Nunavut Land Claims Agreement.

[40] The inclusion of s. 10 in the *Wildlife Act* makes it clear that s. 117(2) cannot be interpreted as restricting hunting (nor for that matter berry picking) by Inuit through the imposition of licensing requirements. It is a matter of settled law that statutes are presumed to be coherent. In *R v Nabis*, [1975] 2 SCR 485, 48 DLR (3d) 543, Beetz J explained that "legal interpretation must tend to integrate various enactments into a coherent system rather than towards their discontinuity": at 494. Absent any language in s. 117(2) indicating that Inuit were intended to be captured in its ambit, I find s. 10 of the Act provides that the impugned provision does not restrict hunting by Inuit.

[41] Another interpretive aid within the statute that reinforces this interpretation is the statement of purpose, values and principles in s. 1 of the Act. Subsection 1(1) of the *Wildlife Act* states the legislation's purpose is to establish a wildlife management regime "in a manner that implements provisions of the *Nunavut Land Claims Agreement* respecting wildlife, habitat and the rights of Inuit in relation to wildlife and habitat." In s. 1(2)(c), the drafters specified that the Act is intended to uphold the following value:

> Inuit are traditional and current users of wildlife and their rights under the *Nunavut Land Claims Agreement* in relation to wildlife and habitat, which flow from that use, should be given full force and effect.

[42] It would be unusual indeed if, after framing the *Wildlife Act* as a means of affirming Inuit rights in relation to wildlife, the drafters had included a provision that operated to impede or restrict hunting rights.

[43] Attention should also be paid to the paramountcy of the *Nunavut Land Claims Agreement* and its recognition of harvesting rights. The maxim of *in pari materia* holds that legislatures are deemed to enact statutes that are coherent with related legislation. I acknowledge that the *Land Claims Agreement Act* is federal legislation and the *Wildlife Act* is territorial legislation. Ordinarily, there is no presumption of coherence between statutes originating from different jurisdictions. However, as Côté notes, at 344, "provincial statutes should be construed with reference to potentially paramount federal legislation." I see no reason not to apply this reasoning to the territorial context, particularly in the instant case where the impugned statute contains a provision

recognizing the paramountcy of the Agreement: s. 5(2), *Wildlife Act*. Again, this contextual reading of the *Wildlife Act* suggests that its provisions are not to be interpreted as limiting hunting rights by imposing licensing restrictions.

[44] Extra-legislative interpretive aids further suggest that s. 117(2) does not restrict the hunting rights of Inuit. The legislative debates preceding the *Wildlife Act*'s adoption tout the drafting of a bill that "fully complies with the provisions outlined in the Nunavut Land Claims Agreement": Nunavut *Hansard*, Legislative Assembly of Nunavut, 1st Assembly, 6th Session, Day 71, at p. 4765; see also pp. 4764, 4776. In addition, the *Wildlife Act* is intended to incorporate Inuit Qaujimajatuqangit (IQ) into public law and "express Inuit needs, rights and values in legal terms": Hansard, at p. 4765. Given the legislative intent of creating a statute that complies with the harvesting rights in the Agreement, incorporates traditional Inuit knowledge and expresses Inuit rights, it is clear that s. 117(2), interpreted contextually, does not impose a licensing scheme on Inuit hunters.

B. (2) Does s. 117(2) of the Wildlife Act infringe s. 7 of the Charter?

[45] The applicant argues that even if s. 117(2) is *intra vires* the legislature and does not impede Inuit hunting rights, the very broad application of s. 117(2) contravenes s. 7 of the *Charter*.

[46] Section 7 of the *Charter* provides that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

[47] In order to establish that s. 117(2) violates s. 7, the applicant bears the burden of proving (i) that the provision causes a deprivation of life, liberty or security of the person; and (ii) that this deprivation is not in accordance with the principles of fundamental justice: *Chaoulli v Quebec* (Attorney General), 2005 SCC 35 at para 109, [2005] 1 SCR 791.

(i). Does s. 117(2) cause a deprivation of life, liberty or security of the person?

[48] I am satisfied that s. 117(2) engages the liberty interest of those subject to its licensing requirement by subjecting them to the risk of imprisonment.

[49] Although corporations cannot ordinarily avail themselves of s. 7, when they are defendants to a prosecution, they may defend a charge by arguing that the law is a nullity. In *R v Wholesale Travel Group*, [1991] 3 SCR 154, 84 DLR (4th) 161, the Supreme Court found that corporations cannot be convicted under an unconstitutional law despite the denial of "liberty" in breach of fundamental justice not being relevant to corporations, which have no right to "liberty."

[50] In the instant case, the deprivation of liberty is made out by ss. 220-221 of the *Wildlife Act*. Collectively, these provisions establish that a person who contravenes a provision of the Act is liable to imprisonment. As the Supreme Court has repeatedly held, the availability of imprisonment engages liberty interests: *PHS Community Services Society v Canada* (Attorney General), 2011 SCC 44 at para 90, [2011] 3 SCR 134; *R v Malmo-Levine*, 2003 SCC 74 at para 84, [2003] 3 SCR 571.

[51] Hence, because it engages the liberty interest of those subject to its licensing requirement, the impugned provision will only comply with s. 7 if it accords with the principles of fundamental justice.

(ii). Is s. 117(2) overbroad such that it offends the principles of fundamental justice?

[52] Overbreadth is concerned with the relationship between a law's purpose and its effect. As McLachlin CJ explained in *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 112, [2013] 3 SCR 1101:

> Overbreadth deals with a law that is so broad in scope that it includes *some* conduct that bears no relation to its purpose…. At its core, overbreadth addresses the situation where there is no rational connection between the purposes of the law and *some*, but not all, of its impacts. [Emphasis in original].

[53] When engaging in an overbreadth analysis, it is critically important for the court to identify the law's purpose and effects. These are distinct concepts. The effects result from the means by which the provision seeks to achieve its purpose. Both purpose and effects are ascertained by focusing on the impugned provision, understood in the context of the legislative scheme as a whole: *R v Moriarity*, 2015 SCC 55, at para 24, [2015] 3 SCR 485.

[54] The overbreadth analysis requires a proper identification of the objective sought by the enactment. Generally, "the articulation of the objective should focus on the ends of the legislation rather than on its means, be at an appropriate level of generality and capture the main thrust of the law in precise and succinct terms": *Moriarity* at para 26.

[55] Articulating the provision's purpose at the appropriate level of generality is imperative. An overly general statement of purpose does not provide a meaningful check on the provision's effects. Virtually all provisions can share a rational connection with a very broadly stated purpose. Conversely, an overly narrow statement of purpose erodes the distinction between ends and means, preventing an inquiry into the connection between them: *Moriarity* at para 28.

[56] Accordingly, the Supreme Court described the appropriate level of generality as residing "between the statement of an 'animating social value' — which is too general — and a narrow articulation, which can include a virtual repetition of the challenged provision, divorced from its context — which risks being too specific": *Moriarity* at para 28.

[57] The GN submits that the purpose of s. 117(2) is to manage and protect wildlife by minimizing impacts to wildlife. The applicant submits that the purpose is "to manage and protect wildlife to ensure continuing access for future generations." I view these to be more appropriate purposes for the Act as a whole rather than for s. 117(2).

[58] I do not therefore adopt either submission.

[59] First, were I to accept such broad statements of purpose as suggested, it would be nearly impossible for the applicant to meet its burden of establishing that s. 117(2) contravenes the *Charter* because of overbreadth. As I have explained, "[a]n unduly broad statement of purpose will almost always lead to a finding that the provision is not overbroad": *Moriarity* at para 28. To succeed in this application, the applicant must establish that some of s. 117(2)'s effects are not

captured by its purpose. That would be a monumental task if the provision's purpose were merely to minimize impacts to wildlife by managing and protecting it or merely to manage and protect wildlife to ensure continuing access for future generations.

[60] Second, in ascertaining the purpose (and means), the court must focus on the impugned provision. I therefore have difficulty accepting that an appropriate statement of purpose for s. 117(2) could be one that is arguably as broad as that which animates the *Wildlife Act* as a whole. The purpose statement in s. 1(1) of the Act, it will be recalled, provides that the legislation as a whole is geared toward the "management of wildlife and habitat in Nunavut".

[61] The statement of purpose may be ascertained by reference to many sources, including explicit purposive statements within the legislation, the text, context and scheme of the legislation, and extrinsic evidence. I reviewed these sources above in relation to the question of whether s. 117(2) is *ultra vires*, and I do not propose to reproduce that analysis. A summary of my findings based on these sources should suffice.

[62] The *Wildlife Act*'s statement of purpose makes it clear that its provisions, collectively, are concerned with managing and protecting wildlife, as well as with the implementation of the Agreement. The legislative debates surrounding the adoption of the Act also speak to the objective of respecting the Agreement. Section 117(2)'s location within the *Wildlife Act*, and its presumed coherence with the absence of licensing requirements for those holding rights under the Agreement as outlined in Part 2, suggest that s. 117(2) is mainly concerned with activities of a commercial nature. Lastly, the provision's text suggests that its particular objective relates to managing the impacts caused by the interaction, manipulation and close observation of wildlife.

[63] Based on the above and being mindful that the statement of purpose should be precise, succinct and not involve the means adopted to achieve the purpose (*Moriarity* at paras 27 and 29), I am of the view that s. 117(2)'s purpose is to manage the interaction, manipulation and close observation of wildlife so as to limit disruption of wildlife habitat and wildlife behaviour in a manner consistent with the *Nunavut Land Claims Agreement*.

[64] As for the effects of s. 117(2), I turn once again to the Supreme Court's guidance in *Moriarity* at para 25: "The effects of the challenged provision depend on the means adopted by the law and are usually easy to identify." In the present case, I find that the means used to achieve s. 117(2)'s purpose are the enforcement of a licensing regime.

[65] As explained earlier, the applicant has proffered five witnesses in order to demonstrate the effects of s. 117(2)'s enforcement. Three of the witnesses testified with respect to the impugned provisions' impact on hunting and berry picking by Inuit and more generally on the Inuit customs and way of life. Earlier in these reasons, I set out some of the specific concerns advanced by the witnesses. This testimony stemmed from the witnesses having been informed that s. 117(2) requires Inuit to obtain a wildlife observation licence in order to engage in wildlife harvesting even where the activity is offered to family or friends as well as where persons are invited or even allowed to follow along on a hunt or berry picking expedition. As I have indicated earlier, the scope of the provision does not, as suggested by the applicant, encompass the broad scope of activities it suggested to the witnesses. Further, as explained earlier, Inuit do not have to obtain a licence to harvest wildlife.

[66] The applicant also argued that if s. 117(2) applied to commercial activities it would limit an Inuk's right to dispose of any wildlife that has been harvested. I do not agree. There are also provisions in the *Wildlife Act* including ss. 85(1) and 107(1) that allow Inuit to dispose freely of any wildlife that was lawfully harvested.

[67] Accordingly, the witnesses' concern as to the effects of s. 117(2) on hunting and berry picking rights of Inuit are misplaced and, in my view, are of no relevance to this leg of the analysis.

[68] The applicant further argued that even if harvesting by Inuit is protected, the incidental and consequential aspects of harvesting by Inuit would come within the licensing requirements of s. 117(2), clearly demonstrating that the provision is overbroad. The witnesses explained that the basis of their concern was the licensing requirements would substantially interfere with the Inuit way of life and activities such as an organized feast following an Inuk child's first kill or the dissemination to an Inuk's friends and family on social media of a picture or film of the first kill.

[69] I acknowledge that viewed in isolation and out of context, organized close observation or manipulation of wildlife that s. 117(2) requires be licensed, could encompass the types of activities discussed by the applicant's witnesses. A proper interpretation of s. 117(2), however, makes it clear that such activities do not come within the licensing requirements established by the section.

[70] As I outlined above, several contextual indicators reveal that s. 117(2) is concerned with activities that are commercial in nature. These indicators include the activities listed in the provision (i.e. the making of a film or the provision of an expedition, safari or cruise). They also include the provision's placement in Part 4 ("Commercial and Other Activities"). Precisely where the line may be between activities of a commercial and non-commercial nature need not be decided in the instant case. If, as I have found, s. 117(2) applies to organized activities of a commercial nature, and given the intent that harvesting by Inuit is not regulated or targeted, it follows that the provision does not have the effect of limiting the incidental or consequential aspects of hunting or berry picking by Inuit.

[71] All of this suggests that the Act and Regulation are clearly focused on the protection of wildlife and wildlife habitat. Section 117(2) seeks to regulate organized activities of a commercial nature where the object is interaction, manipulation or close observation of wildlife. The context makes it clear, in my view, that s. 117(2) does not apply to the incidental or consequential aspects of hunting and berry picking by Inuit. Rather, it relates to wildlife in its natural state, not once it has been hunted or picked by an Inuk. Nor, read in context, would it include making a film where this is no more than the sharing on social media of pictures or film that an Inuk may have made of his or her, or his or her child's first kill.

[72] I conclude therefore that the licensing requirements of s. 117(2) do not restrict hunting by Inuit, the use of social media for the sharing among family and friends, pictures or films taken by Inuit, the holding of feasts or celebrations at which wildlife is celebrated and/or consumed or similar situations. I therefore find that s. 117(2) is not overbroad and does not have the potential to impact the Inuit and their way of life in the manner suggested by the applicant.

[73] Section 117(2) however does require that filmmakers, where the object of the film is the interaction, manipulation or close observation of wildlife, be licensed. This requirement is rationally connected with

the purpose of limiting disruption of wildlife habitat and wildlife behaviour in a manner consistent with the *Nunavut Land Claims Agreement*. In fact, in her testimony, Alethea Arnaquq-Baril agreed that some form of licensing would be appropriate. Her concern was not that regulation was unnecessary but rather that it could be applied too broadly. She was also concerned that regulations might be administered in an improper manner, a concern that is not relevant to my analysis. I pause here to note that I am not passing judgment on the wisdom of licensing such activities. As the Supreme Court stated in *R v Safarzadeh-Markhali*, 2016 SCC 14 at para 29, [2016] 1 SCR 180, "[t]he appropriateness of a legislative objective … has no place in the s. 7 analysis of overbreadth."

[74] To conclude on the issue of overbreadth, I am of the view that, even once s. 117(2)'s purpose statement is narrowed beyond that suggested by the parties, the hypothetical effects proposed by the applicant are either rationally connected to the provision's purpose or are based on an erroneous interpretation of the provision. Consequently, the applicant has not met its burden of establishing that s. 117(2) is overbroad contrary to s. 7 of the *Charter*.

(iii). Is s. 117(2) vague such that it offends the principles of fundamental justice?

[75] The doctrine against vagueness may apply when a law uses language that gives rise to a range of meanings. In *R v Levkovic*, 2013 SCC 25, [2013] 2 SCR 204, Fish J reiterated, at para 32, that the doctrine is founded on two rationales: a law must provide fair notice to citizens and it must limit enforcement discretion.

[76] The bar for finding a law unconstitutionally vague is relatively high. Laws must delineate how one may behave, but they cannot be expected to outline a framework so precise that the legal consequences of any given conduct can be predicted in advance. Certainty only arises in individual cases once a competent authority actualizes the law: *Canada v Pharmaceutical Society (Nova Scotia)*, [1992] 2 SCR 606 at paras 61, 63, 93 DLR (4th) 36.

[77] Instead, a law must "provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria": *Nova Scotia Pharmaceutical Society*, at 639. This legal debate benchmark responds to the twin rationales

underlying the vagueness doctrine by providing substantive notice to citizens and limiting enforcement discretion: *Nova Scotia Pharmaceutical Society*, at 639.

[78] According to the applicant, the language of s. 117(2) is insufficiently precise to delineate the prohibited conduct. The impugned provision could, in essence, apply to a broad spectrum of behaviour. Similarly, the applicant contends that s. 117(2) and its enabling regulations are vague because their application to a number of hypothetical scenarios is unclear. I see two issues with this line of reasoning.

[79] First, in assessing the specificity with which s. 117(2) is drafted, I am guided by the Supreme Court's decision in *Ontario v Canadian Pacific Ltd*., [1995] 2 SCR 1031, 125 DLR (4th) 385. The case concerned a challenge to Ontario's *Environmental Protection Act*, which prohibited discharging a "contaminant" that may impair the quality of the environment "for any use that can be made of it." CP's charge under this provision stemmed from its clearing of weeds and brush along a right of way using controlled burns, the smoke from which adversely affected adjoining residential properties.

[80] In finding the challenged provision of the EPA constitutional, the Supreme Court indicated that the legislature's ability to provide a comprehensive and flexible environmental protection regime may be undermined by a strict requirement of drafting precision. It held that, from a public policy perspective, framing pollution prohibitions generally is desirable: *Canadian Pacific* at para 53. More broadly, the majority wrote that "the environment (its complexity, and the wide range of activities which might cause harm to it) is not conducive to precise codification": *Canadian Pacific* at para 44. Recognizing the need for some degree of generality allows environmental protection legislation to be responsive to a variety of environmentally harmful scenarios, without the drafters having to foresee every possible harm. Accordingly, a deferential approach to reviewing statutes such as the EPA is appropriate. Section 7 must not be used to restrict the considerable room to manoeuvre that drafting environmental protections requires: *Canadian Pacific* at para 59.

[81] In my view, *Canadian Pacific* and its comments on the pollution offences under the EPA are of assistance in assessing the requisite level of drafting precision in the *Wildlife Act*. Both statutes concern environmental protection and the reasoning as to why flexibility is

essential in that area of public policy is instructive.

[82] Moreover, I am guided by the affidavits and *viva voce* evidence of community members submitted on behalf of the applicant. Each witness was of assistance in situating the cultural and social significance in Nunavut of wildlife and the community's intersection with it.

[83] What emerges as a common theme among these witnesses is the importance of preserving the ties between Inuit and the wildlife of Nunavut. Although their concerns were that the section was so broadly drafted as to interfere with the traditional Inuit way of life, their testimony also clearly conveyed the importance wildlife has to their way of life and the hardship that the loss of faunal and floral resources would entail for future generations.

[84] In my view, the evidence of the applicant's witnesses underscores the importance of environmental protection and of applying the deferential approach to reviewing environmental legislation outlined in *Canadian Pacific*. Protecting the environment – including wildlife – is of particular importance in Nunavut, where preserving the ties between Inuit and their surroundings is of critical importance.

[85] This approach to assessing vagueness in the context of environmental legislation substantially weakens the applicant's argument that the language of the provision is impermissibly vague. It will be recalled that the applicant's submission in this regard is that the impugned provisions could apply to a relatively broad array of situations. Although, as explained, the breadth of the impact is much narrower than the applicant argued, the room to manoeuvre that remains is reasonably required in order to be able to respond to a wealth of environmentally harmful scenarios. As the court recognized in *Canadian Pacific*, "the wide range of activities which might cause harm to [the environment]" – in this case, organized activities consisting of interaction, manipulation and/or close observation – "is not conducive to precise codification": at para 44. As was the case with pollution in *Canadian Pacific*, requiring drafters to foresee and strictly define every possible form these potentially harmful activities may take would undermine the legislature's ability to provide a comprehensive and flexible environmental protection regime. The licensing regime enables the imposition of terms for a licence, thereby providing the flexibility to allow the activity while ensuring that the

environment and habitat of the wildlife are not unduly interfered with.

[86] Based on this approach to assessing vagueness, I find that the impugned provisions are sufficiently precise to delineate the prohibited conduct.

[87] Second, and quite independently, I turn to the applicant's use of hypothetical scenarios to illustrate situations in which individuals other than the applicant itself may be uncertain as to whether their behaviour is contrary to s. 117(2).

[88] In my view, this form of hypothetical argument cannot form the basis of a successful vagueness argument. In *Canadian Pacific*, the Supreme Court held, at para 79, that "reasonable hypotheticals have no place in the vagueness analysis under s. 7." Whether s. 117(2) could be considered vague with respect to ordinary Nunavummiut is therefore of no import. As Professor Hogg writes, summarizing *Canadian Pacific*, "[o]nce the law has been determined to apply to the defendant on the facts of the case before the court, the defendant is not permitted to point to the vagueness of the law in its application to other (hypothetical) cases not before the court": Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. suppl. (Toronto: Thomson Reuters, 2016), at 47.18(a).

[89] So it is here.

[90] It will be recalled that the prohibited conduct under s. 117(2) includes "the provision of an expedition, safari or cruise" without a licence. This is the very conduct with which the applicant, an outdoor tour operator, is charged. The impugned provision cannot be said to leave the applicant in doubt as to whether its conduct is prohibited.

[91] As a result, the applicant has not met its burden of establishing that s. 117(2) is void for vagueness. Having not established that the impugned provision's effect on liberty offends the principles of fundamental justice, the applicant's s. 7 claim must fail.

VII. CONCLUSION

[92] I have concluded that s. 117(2) of the *Wildlife Act* and its implementing regulations do not exceed the authority of the Nunavut Legislative Assembly. Moreover, the applicant has failed to establish that the impugned provisions are vague or overbroad contrary to s. 7 of the *Charter*. The application is therefore dismissed.

Dated at the City of Iqaluit this 20th day of June, 2019

_____
Justice P. Rouleau
Nunavut Court of Justice

APPENDIX A

"Background Materials provided to Expert Witness"

Interaction, manipulation or close observation of wildlife

117 (2) No person shall, without a licence authorizing it, establish, offer or provide any organized activity in which wildlife is the object of interaction, manipulation or close observation, including the making of a film or the provision of an expedition, safari or cruise.

Definitions:

WHO DOES THIS APPLY TO?

Anyone who establishes OR offers OR provides any organized activity This does not require that it be a commercial activity (for money)
Organizing or offering an activity to family or friends or community is equally included. Offering can be inviting, asking to join, making a suggestion, allowing someone to follow, it can be verbal (by phone, in person or by radio) or in writing or using an electronic means (ie Facebook or text)

WHAT DOES THIS APPLY TO?

To "interaction (picking, shooting, collecting) OR manipulation (touching or moving or cutting or arranging) OR close observation (watching, tracking, using binoculars or observing)" of "wildlife"

"wildlife" means the flora (plants) and fauna (animals) to which this Act applies under subsections 6(2) and (3), including all parts and products from wildlife;

WHERE DOES THIS APPLY?

Area of application
6(1) This Act applies throughout Nunavut.

DOES THIS APPLY TO ALL PLANTS AND ANIMALS?

"This Act applies in respect of

(a) all terrestrial (land), aquatic (water), avian (air) and amphibian (water and land) flora (plants) and fauna (animals) that are wild by nature or wild by disposition ;
(b) all parts and products from wildlife; and
(c) all habitat of wildlife.

Exception

(3) This Act does not apply to
(a) fish
(b) a marine plant or
(c) a bacterium or virus

DOES THIS APPLY TO ANYTHING ELSE?

This applies to activities inside and outside if they involve **parts and products from wildlife ;**

Application to wildlife and habitat

This also applies to "habitat"

"habitat" means the area or type of site,
(a) where a species, or a member of a species naturally occurs or where it formerly occurred and has the potential to be reintroduced, or
(b) upon which a species, or a member of a species, directly or indirectly depends to carry out its life processes; (habitat)